92-705

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EVELYN C. DAVIS,

Petitioner,

vs.

ROBBIE S. TOWNSEND; JAMES L. DAVIS; SANDRA D. PATTERSON; ILA C. TUTTLE; THOMAS G. DAVIS, JR.; JODY B. DAVIS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a district court vacate and re-enter a judgment after the appeal period has expired, thereby allowing a party to file a timely notice of appeal where timely notice of the entry of the judgment was not received by either or both of the parties?

Must the judgment of the trial court be reversed where there was insufficient evidence introduced by the claimants to show by a preponderance that Mrs. Davis aided and abetted the felonious and intentional killing of the deceased?

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ascertain whether and when a judgment disposing of the merits of the case was entered, the time to appeal the subsequent order for withdrawal of funds had not expired, and the mode of relief requested has found approval in numerous jurisdictions. 6

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Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Evelyn C. Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and appears as Appendix A ("App. A") to this petition. The opinion of the District Court for the Eastern District of Michigan is unreported and appears as Appendix B ("App. B").

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 22, 1992. Justice Stevens of this Court granted an extension of time for the filing of this petition to October 19, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

This case involves Federal Rule of Civil Procedure 60(b), Federal Rule of Civil Procedure 77(d), and Federal Rules of Appellate Procedure 4(a)(1), 4(a)(5), and 4(a)(6).

STATEMENT OF THE CASE

A. Introduction

The nature of this case is one for the recovery of benefits payable by Connecticut General Life Insurance Company on the life of the deceased, Thomas G. Davis. The entitlement of Evelyn C. Davis, wife of the deceased, to those benefits was contested by the Davis' six children, respondents herein. Jurisdiction was vested in the United States District Court for the Eastern District of Michigan on grounds of diversity jurisdiction. Connecticut General Life Insurance Company is not a party to this appeal.

B. Proceedings

Evelyn Davis initiated the action below to recover the proceeds of a group life insurance policy issued by Connecticut General Life Insurance Company insuring the life of her husband, Thomas G. Davis, through his place of employment. The six children of Evelyn and Thomas Davis: Robbie Townsend, Sandra Patterson, Ila Tuttle, Thomas Davis, Jr., James Davis and Jody Davis, intervened in the action, claiming entitlement to the

proceeds of the policy on the ground that their mother was involved in the murder of their father.

Connecticut General admitted liability under the group benefits policy and deposited the appropriate funds with the district court. Following a three-day bench trial before the Honorable George LaPlata, United States District Judge of the Eastern District of Michigan, Southern Division, the court found that the claimant children had established by a preponderance of the evidence that their mother, Evelyn C. Davis, aided and abetted the intentional and felonious killing of the insured, Thomas G. Davis, thus barring her claim to the benefit pursuant to Mich. Comp. Laws § 700.251(3).

The trial court issued its opinion on January 10, 1991, the final line of which stated that, "Judgment may be entered accordingly." (R. 41: Opinion of January 10, 1991, at p. 11) The heart of the procedural issue now before this Court is that despite the entry of judgment on January 10, 1991 (R. 42: Judgment), James M. Hacker, counsel for petitioner, Evelyn C. Davis, through no fault of his own, failed to receive notice that said judgment had been entered. A timely motion for relief from judgment was filed with the United States District Court on March 20, 1991 seeking that the district court vacate and re-enter the January 10, 1991 judgment so as to permit plaintiff to file a timely notice of appeal (R. 47: Motion for Relief from Judgment). Concurrently with the motion for relief from judgment, petitioner filed a claim of appeal from the order of withdrawal of funds entered in the action on February 22, 1991, a post-judgment order which permitted the distribution of the funds of the life insurance policy held in escrow by the Court to the claimants (R. 48: Notice of Appeal from Order of Withdrawal of Funds).

On September 13, 1991, Judge LaPlata entered his order denying petitioner Evelyn Davis' motion for relief from judgment

(R. 58: Order Denying Motion to Vacate Judgment). On October 11, 1991, plaintiff timely filed a notice of appeal from that order (R. 59: Notice of Appeal of Order Denying Motion for Relief from Judgment/Vacate Judgment). Petitioner Evelyn Davis then moved to consolidate the two appeals and briefing schedules, which consolidation was granted by the United States Court of Appeals for the Sixth Circuit on November 22, 1991.

On June 22, 1992, the Sixth Circuit affirmed the district court's judgments. Holding that the district court did not abuse its discretion in denying Mrs. Davis' motion for relief from judgment, thus disposing of the procedural issue related to the filing of the appeal, the Sixth Circuit found that the substantive errors raised were not reviewable.

Mrs. Davis respectfully requests this Honorable Court grant her petition for a writ of certiorari to review the judgments of the lower courts.

C. Substantive Facts

The insured, Thomas G. Davis, was shot on April 13, 1987 at approximately 7:00 a.m. outside his home and died a few hours later. Various circumstantial and hearsay evidence appeared to produce a tenuous connection between Mrs. Davis and the alleged assailant, and her aiding and abetting in the killing of her husband.

The connection was based on facts as tenuous as a coincidental surprise visit by Mrs. Davis to Michigan from her Florida home, despite the fact that there were compelling reasons for the visit, such as a serious health scare Mrs. Davis was experiencing, health insurance papers Mr. Davis needed to file in connection therewith, and her desire to visit a son who was about to ship out on overseas military duty.

Other "suspicions" upon which the claimant children based their claim that their mother was connected with their father's death were also elicited at the trial. Tom Davis testified that, although he didn't keep in touch with his mother very much, he was very doubtful of her truthfulness, but did not know of any occasions on which his mother lied. Having formed the opinion that his father died "an unnecessary and wrongful death", and having further formed the opinion that an acquaintance of Mrs. Davis was responsible for that death, he admitted to being unable to identify any sort of basis for such a conclusion. Moreover, he concluded that his mother was involved in the wrongful death of his father because, "Just of all the facts that point to the situations that occurred, things that were said, the way she acted." When asked to recount an incident of the way she acted that would lead him to such a conclusion, he gave what appeared to be an utterly unconnected event.

In furtherance of the claimants' suspicions, testimony was elicited that the decedent was planning on drawing up a will and changing the beneficiary designations on his group benefits. The will and the beneficiary designations were not accomplished because of Mr. Davis' demise. Apparently, however, Mr. Davis had at least once changed the beneficiary on his benefit policies. Robbie Townsend testified that as of January 1986, *she*, not her mother, was the beneficiary of the decedent's life insurance policy. She had no idea as to why she was removed as beneficiary of the policy and her mother substituted. In fact, at the time of her father's death, she did not know her mother had become the beneficiary, the fact of which she was only later made aware.

Substantial hearsay testimony was admitted in over Mrs. Davis' objection, including that of a "witness" in Michigan, who would presumably have been available for testimony at trial and that of a bartender in Florida.

Despite the evidence obtained through the investigation, and the statements of the claimants, the United States attorney and Macomb County prosecutor's office have not issued warrants nor pressed any charges against Mr. Cramer, the alleged assailant, now deceased, or Evelyn Davis for the murder of Thomas Davis.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION TO VACATE AND RE-ENTER THE ORDER OF JANUARY 10, 1991, WHICH WOULD HAVE ENABLED PETITIONER TO FILE A TIMELY NOTICE OF APPEAL WHERE ACTUAL NOTICE OF THE ENTRY OF THE JUDGMENT WAS NOT RECEIVED BY PETITIONER'S ATTORNEY, A PLEADING FILED BY OPPOSING COUNSEL LED PETITIONER'S ATTORNEY TO BELIEVE THAT NO PARTY HAD RECEIVED NOTICE OF THE ENTRY OF JUDGMENT, DUE DILIGENCE WAS EXERCISED IN ATTEMPTING TO ASCERTAIN WHETHER AND WHEN A JUDGMENT DISPOSING OF THE MERITS OF THE CASE WAS ENTERED, THE TIME TO APPEAL THE SUBSEQUENT ORDER FOR WITHDRAWAL OF FUNDS HAD NOT EXPIRED, AND THE MODE OF RELIEF REQUESTED HAS FOUND APPROVAL IN NUMEROUS JURISDICTIONS.

On March 20, 1991, petitioner moved the district court for relief from the judgment pursuant to Fed. R. Civ. P. 60(b), requesting that the court vacate and re-enter the judgment of January 10, 1991 so as to permit petitioner to file a timely notice of appeal (R. 47: Motion for Relief From Judgment). The district court denied petitioner's motion, from that ruling petitioner appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment of the district court.

Petitioner recognizes that the granting of a motion to set aside a judgment under Rule 60(b) is a matter addressed to the sound discretion of the trial court, and that determination will not be reversed except for an abuse of discretion. The burden is upon the appellant to bring himself within the provisions of Rule 60(b). *Smith v. Kincaid*, 249 F.2d 243, 244 (6th Cir. 1957). In *Blois v Friday*, 612 F.2d 938, 940 (5th Cir. 1980), the Fifth Circuit summarized factors to be considered in addressing a Rule 60(b) motion:

> "Plaintiff's Rule 60(b) Motion must be equitably and liberally applied to achieve substantial justice. Doubt should be resolved in favor of a judicial decision on the merits of the case, and a technical error or a slight mistake by plaintiff's attorney should not deprive plaintiff of an opportunity to present the true merits of his claims. The countervailing factors are the defendants' and society's interests in the finality of judgments and the avoidance of prejudice."

In the case at bar, no substantial prejudice to respondents will now or would have then resulted if the district court's order is vacated. Mrs. Davis' Rule 60(b) motion was made without delay. Mrs. Davis has also met the requirement of Rule 60(b) that the party seeking relief demonstrate a meritorious defense, as set forth in Part II, *infra*. As the second reason for the granting of the writ will show, there was insufficient evidence presented by the claimants to establish by a preponderance that Mrs. Davis aided and abetted the felonious and intentional killing of her husband. Moreover, certain tenuous connections were made solely through the consideration of inadmissible hearsay evidence. "If any defense relied upon states a defense good at law then a meritorious defense has been advanced." *Union Coin Meter v. Seaboard Coastline Railroad*, 705 F.2d 839, 845 (6th Cir. 1983).

The Sixth Circuit relied without elaboration on its decision in *In Re Salem Mortgage Co.*, 791 F.2d 456 (6th Cir. 1986), to affirm the district court. Mrs. Davis maintains, however, that there is in the case at bar a sufficiently extenuating circumstance so as to be analogous to the distinguishing factor present in *Salem*, upon which the court upheld that appellant's Rule 60(b) motion, such that the decision of the court of appeals in the instant case is in conflict with its decision in *Salem*.

After the conclusion of the three-day bench trial on December 13, 1990, the trial court, on January 10, 1991, issued an opinion in which it found that the claimants had, by a preponderance of the evidence, established that Evelyn C. Davis had aided and abetted the felonious and intentional killing of Thomas G. Davis. The concluding sentence of the opinion is a directive that, "Judgment may be entered accordingly." (R. 41: Opinion of January 10, 1991, p. 10) The following day, attorney for claimant Evelyn C. Davis received a copy of that opinion (R. 47: Motion for Relief From Judgment, at paragraph 2; R. 47: Affidavit of Attorney James M. Hacker, at paragraph 2). On January 22, 1991, *the district court docketed a motion by the claimants for entry of an order of Judgment consistent with the trial court's Opinion of January 10. 1991* (R. 44: Motion for Entry of Order of Judgment). Despite a written request to Mr. Beltz from James M. Hacker, attorney for claimant Evelyn C. Davis, for a proposed judgment for purposes of review and objections, no proposed judgment was received from Mr. Beltz, notwithstanding his motions therefor (R. 47: Motion for Relief from Judgment, at paragraphs 5-6).

On February 28, 1991, Mr. Hacker received an order of withdrawal of funds issued by the district court (R. 46: Order for Withdrawal of Funds).

On March 13, 1991, your instant undersigned, at the behest of James M. Hacker, attorney for Mrs. Davis, spoke with the clerk to

Judge LaPlata to determine when, and indeed whether, a principal judgment disposing of the merits of the case was entered (R. 47: Motion for Relief From Judgment, at paragraph 10). As of that date of contact with the district court, the time in which to file a motion to extend the time to file a claim of appeal had not yet expired. F.R.A.P. 4(a)(5). On that date, attorney Turner was informed by Judge LaPlata's clerk that the file would be sent for and reviewed, and for attorney Turner to call back the following day (R. 47: Affidavit of Paula D. Turner, at paragraphs 2-3). Attorney Turner attempted to contact Judge LaPlata's clerk on March 14, 1991, but the clerk was unable to take the attorney's call that day, but did return the call and contact attorney Turner on March 15, 1991, informing her that a judgment had, in fact, been entered on January 10, 1991, which disposed of the merits of the case (R. 47: Motion for Relief From Judgment, paragraph 11; R. 47: Affidavit of Paula D. Turner, paragraphs 4-5; R. 58: Order Denying Motion to Vacate the Judgment, p. 4). On March 15, 1991, the date upon which Mr. Hacker received actual notice that the judgment had been entered on January 10, 1991, the time in which to file an appeal and the time in which to file a motion to extend the time to appeal had expired.

A motion for relief from judgment under Fed. R. Civ. P. 60(b) was filed timely and promptly after attorney and attorney of counsel for petitioner Evelyn C. Davis received actual notice of the entry of judgment. On September 13, 1991, the district court entered Judge LaPlata's order denying Mrs. Davis' motion for relief from judgment.

Despite a proof of service as to mailing of the judgment to attorney James M. Hacker being on file with the district court (R. 42), Mr. Hacker never received a copy of the January 10, 1991 judgment. Moreover, actions by attorneys for both parties subsequent to the date of January 10, 1991 indicate that actual notice of the entry of judgment was not received, certainly not by

Mr. Hacker, and are consistent with the lack of notice to Mr. Beltz.

After the court rendered its opinion on January 10, 1991, with the notation contained therein that a judgment may enter accordingly (R. 41: Opinion, p. 10), Mr. Beltz, attorney for claimants, moved the district court for entry of order of judgment, a motion worded in a manner which fully comports with this possibility (R. 44: Motion for Entry of Judgment). No reference is ever made in that motion for entry of an order which would fulfill the judgment entered by the district court. Indeed, the motion states:

> 1. This Court rendered it's [sic] opinion on January 10, 1991 that the secondary beneficiaries are entitled to the proceeds of the subject matter insurance policy.
>
> * * *
>
> 3. That pursuant to the Courts [sic] opinion the above claimants . . . are entitled to the proceeds of the policy . . . .
>
> * * *
>
> WHEREFORE claimants *ask this Court to sign an order in accordance with its opinion rendered on January 10, 1991* . . . .

(R. 44: Motion for Entry of Judgment, emphasis added). Regardless of the relief Mr. Beltz actually sought by this motion, the very nature of the motion, together with the failure to receive actual notice of the entry of the January 10, 1991 judgment, gave substantial ground to Mr. Hacker to believe that no judgment had yet entered.

Mr. Hacker's response to Mr. Beltz's motion is even more telling. In his letter to Mr. Beltz of January 23, 1991, Mr. Hacker clearly requests that any proposed judgment be forwarded to him for examination.

> If you will send me a copy of your proposed Judgment so that I might review it for form, I can tell you whether or not I object to the language and we can submit competing Judgments to the court for entry, if necessary.
>
> *The Motion for Entry of Judgment does not assist me in ascertaining whether or not your Judgment is correct.*

(Letter of January 23, 1991 from Mr. Hacker to Mr. Beltz, emphasis added). This language fully comports with the grounds for relief stated herein; Mr. Hacker had no actual notice of a judgment of the district court having been previously entered. Moreover, the pleading and letter, together with subsequent telephone conversations between the attorneys, fully comports with neither attorney having received such notice.

Where time to file a motion to extend the time to appeal has expired, a proper method of seeking relief is a motion to vacate and re-enter the judgment under Fed. R. Civ. P. 60(b), so as to correct an inequitable result. This Court first approved this practice in *Hill v. Hawes,* 320 U.S. 520 (1944). Although the Federal Rules of Appellate Practice have since been revised, amending the premise upon which *Hill* was based, numerous courts have permitted the use of Fed. R. Civ. P. 60(b), in limited circumstances, to correct the harsh result a literal interpretation of Federal Rule of Appellate Practice 4(a)(5) requires.

In *Buckeye Cellulose Corp. v. Braggs Electric Constr. Co.*,

569 F.2d 1036 (8th Cir. 1978), *later app.*, 593 F.2d 824 (8th Cir. 1979), the court applied Rule 60(b) in requiring that a district court's order deciding certain summary judgment motions be vacated and reentered, thereby preserving the plaintiff's right of appeal where, although the order had been entered on April 1, 1976, both parties learned of the judgment for the first time on March 28th of the following year.

In *Buckeye*, the Eighth Circuit noted that Fed. R. Civ. P. 77(d) appeared to bar the relief sought by *Buckeye*. Rule 77(d) provides in part:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing.
>
> * * *
>
> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

The *Buckeye* court further noted however that Rule 77(d) must be read together with the provision of Fed. R. Civ. P. 60(b) that, upon motion and under such terms as are just, the district court may relieve a party from a final judgment or order for "any other reason justifying relief from the operation of the judgment". The court then called attention to the Supreme Court's view that Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgment whenever such action is appropriate to accomplish

justice". 569 F.2d 1036 *citing Klapprott v. United States*, 335 U.S. 601, 615 (1949).

Noting that a wooden reading of Rule 77(d) would thwart rather than promote the ends of justice, the *Buckeye* court agreed with the statement of the District of Columbia Circuit Court that:

> We recognize that Rule 77(d) provides that the failure of the clerk to notify a party of the entry of judgment does not extend the time within which the party may appeal. This rule is intended to preserve the finality of judgment. If the parties do not know of the entry of judgment, the winning party cannot rely on the judgment and the losing party cannot make a "free, calculated, deliberate" choice not to appeal. *Ackermann v United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 95 L. Ed. 207 (1950). In these circumstances, the purposes behind Rule 77(d) would not be served by denying the losing party's privilege of appealing and, in our view, justice demands that the losing party be given that opportunity.

Expeditions Unlimited Aquatic Enterprises Inc. v. Smithsonian Institute, 500 F.2d 808, 809 (D.C. Cir. 1974).

Similar authority for a district court to vacate and re-enter an order to start the appeal period running again is found in *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir., 1970) and *Fidelity & Deposit Co. v. USAFORM Hail Pool Inc.*, 523 F.2d 744 (5th Cir. 1975), *cert. denied*, 425 U.S. 950, 96 S. Ct. 1725, 48 L. Ed. 2d 194, *on remand*, 465 F. Supp. 478 (M.D. Fla. 1979).

Some jurisdictions have relied on Fed. R. Civ. P. 60(b)(1) to

effect similar relief. In *Cederbaums v. Harris*, 484 F. Supp. 125 (S.D.N.Y. 1980) a habeas corpus petitioner's counsel had demonstrated excusable neglect under Fed. R. Civ. P. 60(b) where, among other things, he had failed to receive notice from the court clerk's office of the denial of an extension of time to appeal the denial of the habeas corpus petition. The court observed that it was not until the day before a notice of appeal would have been due had the extension been granted, that the petitioner, upon calling the court, was informed that the motion for an extension had been denied about 20 days earlier. In the court's opinion, the failure of the attorney to receive the notice, the fact that he had undertaken diligent efforts on behalf of his client, and the absence of prejudice to or even opposition from the state were all factors favoring relief.

Basing its conclusion by implication upon the "excusable neglect" clause of Rule 60(b)(1), the court in *Zurich Ins. Co. v. Wheeler*, 838 F.2d 338 (9th Cir. 1988) held that the district court did not abuse its discretion in vacating and re-entering a judgment in favor of an insurer in an admiralty suit on a policy of hull insurance, notwithstanding that no appeal had been brought within the period designated by Federal Rule of Appellate Procedure 4(a). Several facts in the *Zurich* case are similar to those presented in the case at bar. First, counsel in *Zurich* had begun attempting to contact the court's clerk before the time to appeal had expired. In the case at bar, an attorney of counsel for claimant Evelyn Davis contacted the clerk to Judge LaPlata before the time in which to file a motion to extend the time to appeal had expired. In *Zurich*, the clerk promised to check the status of the order and call back, but by the time the clerk was able to review the file and determine the status of the order in question, time to appeal had expired.[1]

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1. *Stevens v. ITT Systems Inc.*, 868 F.2d 1040 (9th Cir. 1989), in distinguishing the facts of the *Zurich* case from those before it, taking judicial notice of a number of details involved in the *Zurich* case that were not mentioned in that court's opinion.

In the case at bar, Judge LaPlata's clerk promised to check the status of the order and convey that to counsel, but by the time the clerk was able to obtain the file and make a determination of the status of the judgment, time in which to file a motion to extend the time to appeal had expired. As in the *Zurich* case, where the appellant had filed the Rule 60(b) motion 74 days after the entry of judgment and only 12 days after discovery of the entry, Mrs. Davis' motion was filed promptly, less than one week after attorney for claimant Evelyn Davis received actual notice of the entry of the judgment, and less than ten weeks after the actual entry was made.

Some jurisdictions have granted relief without stating the exact subpart of Rule 60(b) upon which they relied. In *Vasquez v. Brezenoff*, 93 F.R.D. 583 (S.D.N.Y. 1982), the court, although not stating that its decision was based upon a finding of excusable neglect, held that it would be an appropriate exercise of its discretion to grant relief to the plaintiffs, who had moved under Fed. R. Civ. P. 60(b)(1) and 60(b)(6) to have a judgment vacated and re-entered on various grounds, including the ground that the failure of the plaintiff's counsel to learn of the entry of the judgment constituted excusable neglect. In *Vasquez*, two months after the entry of judgment, counsel discovered the judgment had been entered, and filed the Rule 60(b) motion a few days after the expiration of the 30 days permitted for appeal plus the additional 30 days which could be granted under Federal Rules of Appellate Procedure 4(a) on a finding of excusable neglect. While noting that the finality of judgments is undoubtedly a weighty consideration, the court granted the motion and directed that the clerk vacate the judgment previously entered and enter judgment for the defendants.

Similarly, in *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1986), *rehearing denied en banc*, 818 F.2d 871 (11th Cir. 1987), the court, although quoting the provisions of Pennsylvania Rules of Civil Procedure 60(b)(1) and 60(b)(6) without discussing

any particular provisions of those rules, held that the district court had avoided the manifest injustice worked by a rigid application of the provisions of Federal Rule of Civil Procedure 77(d) by availing itself of the escape valve provided by Rule 60(b) in vacating and re-entering its order denying the plaintiffs' Federal Rule of Civil Procedure 59(e) motion.

In *Tessmer v. Walker*, 833 F.2d 925 (11th Cir., 1987), the court, although not specifically stating that its determination that the failure of the attorney for the plaintiff to learn until December 1985 of the district court's entry of judgment in favor of the defendant on June 12, 1985 was the result of excusable neglect on the attorney's part, held that the district court had committed reversible error in denying the attorney's motion, filed under Federal Rule of Civil Procedure 60(b)(1) and 60(b)(6), requesting the district court to vacate and re-enter the June 12 judgment so as to restart the time for perfecting an appeal. The court acknowledged that it had consistently held that the clerk's failure to provide notice of the entry of a judgment is not itself sufficient ground for the vacation of that judgment under Rule 60(b), and that Federal Rule of Civil Procedure 77(d) expressly states that the lack of notice by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. However, the court stated that non-receipt of notice from the clerk is a circumstance which may militate in favor of granting such a motion, when coupled with certain other considerations, including lack of prejudice to the non-moving party, prompt filing of the Rule 60(b) motion after actual notice of the entry of judgment, and due diligence by counsel in seeking to be informed of the entry of judgment. The court added that Rule 60(b) relief is appropriate when unusual or exceptional circumstances are created by a combination of the foregoing factors.

In the case at bar, this combination of the above enumerated factors exists. The nature of Mr. Beltz' motion for entry of

judgment, coupled with Mr. Hacker's letter requesting to see a proposed judgment before it was submitted to this court, together with statements made between the attorneys relative to that pleading and letter which indicated that neither party had received notice that a judgment had been entered on January 10, 1991, the prompt filing of the motion for relief from judgment after actual notice of the entry of judgment and the due diligence of contacting the court before the expiration of time in which a motion to extend the time to appeal could have been filed, combine to establish this case as one deserving of such relief.

The manifest injustice which has resulted from strict interpretation of Rule 77(d), and the need for a method to alleviate that injustice can be seen in the amendments to Federal Rule of Appellate Procedure 4(a) and Federal Rule of Civil Procedure 77(d) proposed in 1989 and adopted December 1, 1991 which make it unnecessary in some instances for a party to rely on Rule 60(b) to remedy his failure to file a timely notice of appeal from a judgment or order because of his failure to receive a timely notice of the entry of the judgment or order. Federal Rule of Appellate Procedure 4(a)(6) provides that if the district court finds that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and that no party would be prejudiced, it may, upon motion filed within 180 days of entry of the judgment or order, or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal. Proposed Federal Rule of Civil Procedure 77(d) would eliminate the language in that rule stating that the clerk's mailing of the notice of the entry of the judgment or order as required by that rule is sufficient notice for all purposes for which notice of the entry is required by the Rules of Civil Procedure. The case at bar would clearly fall within the parameters of the proposed rule.

Because some jurisdictions have granted such relief under Rule 60(b)(1), and others have granted relief under Rule 60(b)(6), and yet others have merely granted relief without specifying upon which subsection of Rule 60(b) they relied, the motion below was predicated upon both subsections, jointly or in the alternative, and counsel maintains that sufficient grounds exist to support relief under either or both subsections.

II.

THE VERDICT RENDERED BY THE TRIAL COURT CANNOT BE SUSTAINED WHERE THERE WAS INSUFFICIENT EVIDENCE INTRODUCED BY THE CLAIMANTS TO SHOW BY A PREPONDERANCE THAT MRS. DAVIS AIDED AND ABETTED THE FELONIOUS AND INTENTIONAL KILLING OF THE DECEASED.

Mrs. Davis presents this argument in support of the "meritorious defense" requirement inherent in a Rule 60(b) motion. Moreover, had timely notice of the entry of judgment been received by counsel for Mrs. Davis, an appeal would have presented the instant argument which raises substantial grounds for reversal of the trial court's decision in favor of the claimants.

Mrs. Davis contends that there was insufficient evidence presented by the claimants upon which to sustain a verdict in their favor. Such an assignment of error is permissible without a motion for new trial having been made in the district court, where the trial was to the court without a jury. *Freightway, Inc. v. Stafford*, 217 F.2d 831 (8th Cir. 1955). In order for Mrs. Davis to be denied the benefits under the policy on which she was a named beneficiary, the party seeking to exclude her recovery must, in the absence of a conviction of felonious and intentional killing or aiding and abetting the killing, establish by a preponderance of the evidence that she, as beneficiary, feloniously and intentionally killed or

aided and abetted in the killing of the decedent. Mich. Comp. Laws § 700.251(1), (6). In the case at bar, the trial court did not find Evelyn Davis to be a principal in the felonious and intentional killing of Thomas G. Davis, but rather that she aided and abetted the intentional and felonious killing of the insured, Thomas G. Davis (Opinion, pp. 9-10). In order for a defendant to be guilty of aiding and abetting a crime, it must be proven that (1) the substantive criminal offense was committed by the defendant or by another; (2) the defendant performed acts or gave encouragement which aided or assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving of aid or encouragement. *Metro Life Ins. v. Reist*, 167 Mich. App. 112, 421 N.W. 2d 592 (1988); *People v. Rockwell*, 188 Mich. App. 405, 411, 470 N.W. 2d 673 (1991). Although the phrase "aiding and abetting" describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which may support, encourage or incite the commission of a crime, mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor. *People v. Vicuna*, 141 Mich. App. 486, 495-496, 367 N.W. 2d 887 (1985) (citations omitted). Moreover, the defendant must either himself possess the required intent, or participate while knowing that the principal possessed the required intent. *Id.*

Mrs. Davis respectfully contends that no such showing by proper, admissible evidence was made. It is well established that a trial court sitting as trier of fact has the inherent ability to judge the credibility of witnesses and may give such weight to testimony as, in his opinion, it is entitled to, and a reviewing court will not reverse unless the evidence clearly preponderates in the opposite direction. *Lather v. Michigan Public Service Co.*, 332 Mich. 683, 52 N.W. 2d 551 (1952). Moreover, it is recognized that it is the province of the trial judge in a non-jury case to draw legitimate inferences and weigh probabilities from established facts. *Hall v.*

Horak, 329 Mich. 16, 44 N.W. 2d 848 (1950). However, a fact finder is limited to drawing reasonable inferences from established facts and may not be asked to conjecture or speculate from facts not supporting reasonable inference. *Daniel v. McNamara*, 10 Mich. App. 299; 159 N.W. 2d 339 (1968). Despite these rules, however, it is also clearly established that under Michigan law, presumptions and inferences may not rest presumption on presumption, nor inference upon inference. *Busam Motor Sales v. Ford Motor Co.*, 85 F. Supp. 790 (D.C. Ohio 1949). However, it was only through this impermissible stacking of inferences that the trial court could have possibly reached the conclusion it did.

The district court itself noted at page 9 of its opinion that, "It may be inferred that Mrs. Davis intended that the victim be killed, or knew that the killing was intended when she provided aid and encouragement." This ultimate conclusion, however, is based upon several other inferences drawn solely from circumstantial evidence.

Initially, the court found that the evidence connected one William Cramer with the killing of Thomas Davis. The circumstantial evidence upon which the court relied in making this determination was that Cramer, a Floridian, had stayed at a Red Roof Inn approximately one and a half miles from the scene of the shooting, and that he was driving an older, white, four-door car with Florida plates. The only evidence connecting an older, white, four-door car to the scene of the crime was from a person who lived across the street from Mr. Davis, who did not testify in court, but whose testimony was brought in solely through a statement made to an investigating police officer, and which statement was contained in that police officer's report. Mrs. Davis' counsel objected to the statement as being double hearsay, *i.e.*, what the witness told Officer Zaluski, who then presumably included the information in his report to Officer Loeffler, who was testifying. The trial court ostensibly admitted the testimony, as it did virtually

all of officer Loeffler's testimony, under M.R.E. 803(8)(c), Public Records and Reports. However, in order for hearsay within hearsay to be admissible, each part of the combined hearsay statement must conform with an exception to the hearsay rule. *Cooley v. Ford Motor Co.*, 175 Mich. App. 199, 437 N.W.2d 638 (1988). Moreover, the Sixth Circuit has held as clearly erroneous and prejudicial the admission of a hearsay statement of an eyewitness to an arm injury where the out-of-court declarant was available, but did not testify, the statement had none of the circumstantial guarantees of trustworthiness recognized as an exception to the hearsay rule in the case of an available witness and the out-of-court declarant was apparently the only eyewitness to the accident. *Desheles v. T.W. & C.B. Sheridan Co.*,482 F.2d 852 (6th Cir. 1973). The same analogy applies in the case at bar to the statement given by the witness Koryla to officer Zaluski. In that statement the "witness" identified the automobile as a Plymouth, whereas Mr. Cramer's automobile was an Oldsmobile. Despite the fact that the witness was apparently able to clearly identify the make of the automobile, no identification as to license tags or plates was made. The guarantee of trustworthiness is sorely lacking here. Moreover, it is only by inference that one can connect the white automobile seen at the scene of the shooting as being the automobile belonging to William Cramer.

Despite any direct testimony from witnesses available for cross-examination, the court relied on the hearsay testimony of several witnesses to establish a connection between Mrs. Davis and William Cramer. Detective Loeffler testified that during the course of his investigation, he and another detective went to Florida in an attempt to establish a connection between William Cramer, Evelyn Davis and George Petr. Detective Loeffler further testified that a bartender in the State of Florida stated to him that several weeks prior to the detectives' arrival in Florida, Mrs. Davis and Mr. Petr had entered his bar asking when they could make contact with Mr. Cramer.

This testimony was again allowed in over Mrs. Davis' counsel's objection that the information was patent hearsay. Despite noting the unquestionable hearsay nature of the testimony, the court allowed the testimony without noting any exception to the hearsay rule as the basis for the admissibility of such testimony. Once a statement is found to be hearsay, it is inadmissible unless it falls within one of the recognized exceptions to the hearsay rule. *Swartz v. Dow Chemical Co.*, 414 Mich. 433, 326 N.W. 2d 804 (1982). There was no exception stated in this instance.

The police never asked Evelyn Davis whether she knew Mr. Cramer, despite the fact that Mrs. Davis had returned to Florida when Detective Loeffler and his partner were in that state questioning others as to the connection between Mrs. Davis, Mr. Petr and Mr. Cramer.

The second pyramided inference which the court was required to draw from the testimony at trial was that Evelyn Davis knew that William Cramer would come to Michigan for the purpose of killing Thomas Davis, and in fact, did indeed commit that crime. As there was no evidence adduced at trial which would indicate direct knowledge of Mr. Cramer's intent, the only possible method of reaching this conclusion was by inference. That inference is, again, drawn from circumstantial evidence given in large part by the Davis' daughter, Robbie Townsend. Ms. Townsend testified that on the morning of the shooting, after she received a phone call informing her that her father had been shot, Mrs. Davis appeared at the door of the bedroom which she had been occupying, fully dressed, stating that she wanted to go along. Ms. Townsend stated that for her mother to be up and dressed at 7:00 a.m. was unusual, because in the approximately three weeks during which her mother had been staying with her, Mrs. Davis usually arose between 8:00 and 8:30, and would take morning coffee somewhere around that time still in her night clothes. However, Ms. Townsend also testified that as soon as she got the phone call, she grabbed her coat,

ran to the bedroom door where her mother and George Petr were, banged on the door and was screaming that her father had been shot. Several minutes had elapsed between the time of the phone call and the time Mrs. Davis appeared ready to go out the door with Ms. Townsend. Additional testimony throughout the trial indicated that Mrs. Davis' visit to Michigan at that time was a surprise. Despite the inference that can be drawn by the "surprise nature" of such a visit, given the other circumstances which occurred during Mrs. Davis' visit to Michigan, other equally compelling inferences can be drawn. Equally compelling testimony as to other inferences was given by the same witnesses who testified to the surprise nature of Mrs. Davis' visit: her health concerns, and her desire to see her son and his family before they shipped overseas.

It was well established through testimony that Mrs. Davis was dependent upon Mr. Davis for medical benefits received through the Blue Cross/Blue Shield insurance plan covering her through his employer. In fact, despite instituting divorce proceedings several times, a divorce was never finalized because of the extreme hardship it would create on Mrs. Davis if she lost those medical benefits. Despite this past concern with loss of medical benefits, and despite the physical evidence indicating that there were, in fact, lumps which Mrs. Davis had found indicating the necessity for further medical tests, the court and Mrs. Davis' children interpreted Mrs. Davis' fear "that something was going to happen to your father" as showing that "Evelyn Davis knew what was going to happen to her husband." (Opinion, p. 9). It is clear that where evidence authorizes several equally permissible inferences, no one of them is sustained by substantial evidence. *New York Life Ins. Co. v. Roufos*, 83 F.2d 620 (6th Cir. 1936).

In *Roufos*, an insurer disputed its liability under a double indemnity clause of an insurance policy issued upon the life of a decedent. The decedent died shortly after falling down a flight of basement stairs, and the insurer contended that the double

indemnity benefit did not apply, contending that the fall was brought about directly or indirectly from a previous illness from which the decedent had suffered. The court noted that although no one saw the accident, it did not preclude a reasonable inference from established facts as to how it occurred. However, the court also noted that it is likewise "well settled that, where there are several equally permissible inferences, no one of them is sustained by substantial evidence". *Id.* (Citation omitted.)

As the Michigan Court of Appeals noted in *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 331-332; 196 N.W. 2d 316 (1972), "If there are two or more equally plausible explanations arising out of evidence, selection of one would not be a reasonable inference, but would rather be mere conjecture on the part of the trier of fact." *See also, Meli v. General Motors Corp.*, 37 Mich. App. 514, 195 N.W. 2d 85 (1972). And a verdict may not rest upon bare conjecture. *Fireman's Insurance Co. v. Sterling Coal Co.*, 348 Mich. 564, 83 N.W. 2d 319 (1957). In its opinion, the trial court draws several other inculpatory inferences upon which it bases its ultimate inference. The court notes at pages 4-5 that a bar owner, Charles Graham, who knew Mr. Cramer, told officer Loeffler that Cramer and Mr. Petr had met several times in his bar after returning to Michigan. The court found that after officer Loeffler told Mr. Cramer he was investigating the murder of Mr. Davis, Mr. Cramer refused to discuss it further, wanting an attorney present. The court then noted that Mr. Graham was killed in his bar the day before the trial began in the instant case. The conclusion the court draws from this is obvious: "the Court finds that the evidence connects Cramer with the killing, and Cramer to Evelyn Davis, and shows that Evelyn Davis knew what was going to happen to her husband." (R. 41: Opinion of January 10, 1991 at p. 9).

The court also apparently drew a negative inference from the fact that George Petr did not testify at trial (R. 41: Opinion of

January 10, 1991 at p. 3). It should be noted, however, that even the testimony of Evelyn Davis had become the responsibility of the claimants', Mr. Beltz himself being unsure as to who the plaintiffs and defendants were in the case.

At this point, then, the trial court has inferred that from the description of the assailant and the older, white, four-door car seen at the scene of the shooting, Thomas Cramer was, in fact, the assailant. The trial court has further inferred that, because Mrs. Davis or Mr. Petr, or both, had known Thomas Cramer in Florida before Mr. Davis was shot, and because of her concern that "something might happen" to Mr. Davis, she was aware that Thomas Cramer was going to shoot Mr. Davis. The final conclusion of the court, that Mrs. Davis aided and abetted Mr. Cramer in precipitating the untimely death of Mr. Davis, is yet again a third inference drawn from and resting solely upon the previous two inferences and the fact that Mrs. Davis knew where her husband lived. As such, it is the ultimately impermissible top of the inference pyramid.

The quantity and nature of the evidence fails to support the trial court's verdict.

CONCLUSION

For these reasons, petitioner's request for a writ of certiorari should be granted.

Respectfully submitted,

PAULA D. TURNER
Attorney for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 22, 1992

Nos. 91-1380/2194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVELYN C. DAVIS,

Plaintiff-Appellant,

v.

CONNECTICUT GENERAL LIFE INSURANCE, A Foreign Corporation;

Defendant,

ROBBIE S. TOWNSEND; JAMES L. DAVIS; SANDRA D. PATTERSON; ILA C. TUTTLE; THOMAS G. DAVIS, JR.; JODY B. DAVIS,

Claimants-Appellees.

ORDER

BEFORE; KEITH and RYAN, Circuit Judges, and WEBER, District Judge.*

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* The Honorable Herman J. Weber, U.S. District Judge for the Southern District of Ohio, sitting by designation.

Appendix A

Evelyn Davis, who is represented by counsel, appeals a district court order (Case No. 91-1380) directing the distribution of life insurance proceeds and a district court order (Case No. 91-2194) denying her motion to set aside a judgment filed under Fed. R. Civ. P. 60(b). The cases have been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a). Appellees have waived oral argument. Although requested to do so by March 23, 1992, Davis has not objected to the submission of the appeals on the briefs. Therefore, Davis is deemed to have waived oral argument pursuant to Sixth Circuit Rule 9(d).

Davis sued Connecticut General Life Insurance Company for the proceeds of a life insurance policy issued on her husband, Thomas G. Davis, who was murdered in April 1987. The claimants-appellees are the children of Thomas and Evelyn Davis, who intervened claiming entitlement to the proceeds on the grounds that their mother was involved in the murder of their father. Connecticut General admitted liability and deposited the proceeds with the district court. Following a bench trial, the court found that Evelyn Davis aided and abetted in the murder of her husband, barring her claim to the proceeds under Michigan law. The district court entered its opinion and judgment on January 10, 1991. Davis did not appeal the judgment.

On February 22, 1991, the district court ordered that the insurance proceeds be distributed to the appellees pursuant to its judgment of January 10, 1991. Davis filed a timely appeal (Case No. 91-1380) from this order. On March 20, 1991, Davis filed a motion for relief under Fed. R. Civ. P. 60(b). Davis requested the district court to vacate its January 10, 1991 judgment and then reenter the same judgment so she could file a timely appeal from the judgment

to this court. The motion was denied. Davis filed a timely appeal (Case No. 91-2194) from this order. On appeal, Davis argues that the district court abused its discretion in denying her motion for relief and that there was insufficient evidence to support the district court's underlying judgment. In their brief, appellees request costs and attorney's fees pursuant to Fed. R. App. P. 38.

Upon review, we affirm the district court's judgments. Davis cannot challenge the district court's order directing the distribution of life insurance proceeds as the law of the case doctrine supports the implementation of the judgment absent an appeal and order staying the judgment pending an appeal from the underlying judgment. *See Arizona v. California*, 460 U.S. 605, 618 (1983); *Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1137 (6th Cir.), *cert. denied*, 112 S. Ct. 81 (1991); *Cale v. Johnson*, 861 F.2d 943, 947-48 (6th Cir. 1988). Furthermore, the district court did not abuse its discretion in denying Davis's motion for relief from judgment filed under Fed. R. Civ. P. 60(b). *See In re Salem Mortgage Co.*, 791 F.2d 456, 459 (6th Cir. 1986). Davis's argument that the district court's judgment of January 10, 1991, is not supported by sufficient evidence is not reviewable on appeal. *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

Accordingly, we hereby affirm the district court's judgments. Rule 9(b)(3), Rules of the Sixth Circuit. We deny appellees' request for costs and attorney's fees.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JANUARY 11, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.A. No. 88-CV-60112-AA

HON. GEORGE La PLATA

EVELYN DAVIS,

Plaintiff,

vs.

CONNECTICUT GENERAL,

Defendant.

OPINION

This action was initiated by Evelyn Davis to recover the proceeds of a group life insurance policy issued by Connecticut General Life Insurance Company insuring the life of her husband Thomas G. Davis, through his place of employment. The six children of Evelyn and Thomas Davis, Robbie Townsend, Sandra Patterson, Ila Tuttle, Thomas Davis, Jr., James Davis and Jody Davis, are claiming entitlement to the proceeds of the policy, because they believe their mother was involved in the murder of their father. Connecticut General has admitted liability under the group benefits policy and deposited the funds with the Court. In

addition, it is stipulated that the estate has no claim to the proceeds, that Mrs. Davis is the primary beneficiary and that the children are secondary, or first surviving beneficiaries under the policy.

During the bench trial of this matter testimony was taken from the following twelve witnesses: the widow Evelyn Davis; Agent Robert Payne of the FBI; Warren Police Detective Gerald Loeffler; five of the children claimants, Robbie, James, Ila, Tom Jr., and Sandra; two grandchildren of the deceased, John and Jamie Townsend; the attorney for the deceased, Mr. James Temple; and Kay Bowen (formerly Kay Wallen). Without reciting all the testimony, the Court makes the following findings of fact and conclusions of law.

Thomas Davis, age 58, was shot on April 13, 1987, shortly before 7 a.m., outside his home, by an assailant who was described by the victim as a man at least his age, with horned-rimmed glasses, wearing a blue cap and a maroon type jacket. The victim expired a few hours later from the gunshot wound.

Michigan law provides that a named beneficiary of a life insurance policy who "feloniously and intentionally kills or aids and abets the killing of . . . the individual upon whose life the policy is issued", is not entitled to any benefit under the policy and it becomes payable "as though the beneficiary predeceased the decedent". M.C.L.A. 700.251(3). Further, where there has not been a conviction for such killing, the standard of proof is by a preponderance of the evidence. M.C.L.A. 700.251(6).

Neither the federal nor local City of Warren police investigations have resulted in charges arising out of this killing. Nevertheless, it is clear from the evidence that Mr. Davis was killed intentionally and feloniously by his assailant. To find that

Mrs. Davis aided and abetted that killing, the children must prove by a preponderance of the evidence (1) that the crime was committed; (2) that Mrs. Davis performed acts or gave encouragement which aided and assisted the commission of the crime; and (3) that Mrs. Davis intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v. Acosta*, 153 Mich. App. 504, 512, lv den. 428 Mich. 865 (1987).

The decedent and Mrs. Davis had been separated since about 1981. Mrs. Davis has been a resident of Florida and having an affair with George Petr since then; and they have lived together for a number of years. The police investigation disclosed that the estranged Mrs. Davis had arrived in Michigan under extremely unusual circumstances, about three weeks before the murder and that Petr, her paramour, arrived in Michigan one week before the murder. Mrs. Davis and Petr told police they knew nothing about the shooting of Mr. Davis. At trial, Mrs. Davis testified that she did not aid, abet or conspire to kill her husband and did not know who had killed him. Notably, no testimony from George Petr was offered at trial.

Although divorce proceedings were initiated, the Davis' were never divorced. Evelyn Davis returned to Michigan in 1981, when divorce proceedings were initiated. A property settlement was reached, but the divorce was postponed so Mrs. Davis could continue to have medical care coverage. In October 1985, Mrs. Davis made another visit to Michigan because divorce proceedings were reinstated. Instead, the Davis' reached an understanding that he would have the condominium in Michigan and she would have the mobile home in Florida. The decedent would pay her car payments, insurance, interest from a Certificate of Deposit and $50.00 per week. During her visit in 1987, Thomas Davis was killed.

Appendix B

Detective Loeffler, a homicide detective of ten years and the officer in charge of the police investigation, testified that the shooting was a homicide unconnected with robbery or any other felony. He received information that a dirty white 4-door car was seen leaving the area after a shot was heard. Checking nearby hotels, police found that one William Cramer, an older white man from Lake Worth Florida, had stayed at the Red Roof Inn only 1 1/2 miles from the scene and he was driving an older white 4-door car with Florida plates.

Cramer checked into the hotel April 6, 1987, the same day that Petr arrived in Michigan, paid daily, and checked out on Monday, April 13, 1987, about an hour after the shooting. When Robbie questioned her mother about Cramer in front of Petr, she denied knowing anyone by that name. However, Evelyn Davis testified at trial that she knew Cramer was a friend of Petr's and that Cramer and Petr had come from Florida at the same time in separate cars.

Detective Loeffler went to Florida armed with photographs of Cramer, Petr and Mrs. Davis, and established from several sources that Petr and Cramer were known to be friends and associates. He also learned that Petr had gone into several bars looking for Cramer shortly before the murder. One bar owner, Charles Graham who knew Cramer, told Loeffler that Cramer and Petr had met several times in his bar after returning from Michigan. When Cramer was approached outside that bar, he said he had been in Michigan to see Kay Wallen and gave an address in South Lyon. But, once Loeffler said they were looking into the murder of Thomas Davis, Cramer refused to discuss it further, saying he wanted an attorney present. Graham was killed in his bar the day before the trial began in this case. Cramer has since died of cancer.

Loeffler questioned why Cramer would stay at the Red Roof Inn in Warren, Michigan, if he were visiting someone in South

Lyon, which is some distance away. When the investigating officer located Kay Bowen (formerly Wallen), she denied knowing a Bill Cramer. However, at trial Kay testified that she met Cramer in Florida, where she worked as a topless dancer. She testified that Cramer was a friend and a nice person. She knew him about a year, talked to him about once a month and had been to his apartment about three times. She did not know what kind of car he drove, or what he did for a living. Kay last saw Cramer in July 1986, before leaving Florida, and talked to him once by telephone after returning to Michigan. Kay testified that her parents home was in South Lyon, but they had moved from there by March 1, 1987.

At the time of his death, the victim had been living with Glenda Collis for about six months (since about October 1986), in a condominium near Robbie Townsend's house. The location of his new condominium was kept from Evelyn Davis at his request. Sandra testified that around the beginning of 1987, her mother asked for her father's address and telephone number. Sandra refused and Evelyn became very angry, called the victim names and threatened that he would "get his". Robbie specifically told her children, John and Jamie, not to give the telephone number at the condo to their grandmother. Evelyn questioned questioned both Jamie and John about where their grandfather lived, asking if they had ever gone there alone and if they knew how to get there. John explained how to get there several times and finally drew a map for her.

Attorney Temple testified that the victim came to see him not long before he was killed about making a will and changing the beneficiary of his life insurance. Temple testified that although neither was accomplished before his death, Temple had made inquiries about the insurance policy at his behest.

Appendix B

Mrs. Davis, who was continually unemployed, testified that she lived on the interest from the C.D. and the insurance proceeds from the total fire loss to the mobile home. The mobile home burned April 2, 1986, when Mrs. Davis and Mr. Petr were away. Although the fire was considered suspicious, the insurance company paid for the loss. Petr's mobile home in the same park burned less than a year earlier, on August 20, 1985.

At trial Mrs. Davis testified that she did not know of anyone being asked to burn her mobile home. However, her son James took the stand and testified that in the presence of his mother, Petr offered him $1,000.00 to burn it down. This was four to six months before the fire. In fact, James testified that he told his father about the offer. Tom Jr. also testified that Petr offered him $1,000.00 to burn the trailer. Both sons say they refused to do it. Mrs. Davis did not offer evidence to rebut this probative evidence regarding credibility.

Mrs. Davis testified that she had already bought the house on Mainsail in Port St. Lucy, before the mobile home burned. In November 1986, the decedent quitclaimed his interest in that house to Evelyn, after she had repeatedly called him at work about it. Evelyn testified that she and her husband had agreed that because she paid the insurance on the mobile home, the insurance money from the fire was to be hers. Whether or not they had agreed to this, the evidence showed that the decedent was very upset about not getting part of the insurance money when the check was deposited in a Florida bank account. He spoke to Temple about it, and was advised to deal with the police. Robbie understood that her father planned to contact the authorities in Florida.

Before the 1987 visit, Evelyn called Robbie and offered to take care of John and Jamie, so Robbie and her husband could go

on a trip that Robbie had won. Robbie thought this was strange because Evelyn had not watched the kids before. Robbie told her they would not be taking the trip and asked her not to come because it was a bad time for a visit. So, Evelyn Davis said she would be coming instead to visit Jody and his new baby. Jody was visiting from Colorado and would soon be going out of the country. Evelyn arrived almost a week after Jody did, and stayed almost two weeks after he left.

After Mrs. Davis arrived, she talked with both Robbie and Ila about being ill and gave them the impression that it was serious. In this context, Evelyn told Robbie something was going to happen to her father, so he should make a will leaving everything to her and she would do the same. Within a week of the murder, Evelyn told Ila she was afraid something would happen to her father because of Glenda's past.

During the visit, Mrs. Davis spent a great deal of time sitting in the kitchen looking out the window that faced her husband's condominium and her conversations revolved around he and Glenda. Evelyn asked a lot of questions about them; including where his bank was located, what time he left for work in the morning and if he had a gun. A number of times, Evelyn got angry about Glenda living with the decedent and would yell and use profanity. Evelyn would say it was not fair that Glenda and their father were living so well, when she had so little. Robbie testified that in these outbursts her mother threatened to "get him" and to "get even" with Glenda.

On April 13th, Robbie was awakened at 7 a.m. by the call about the shooting. She immediately pulled on some shoes and a coat and knocked on her mother's bedroom door. Although it was only minutes after the call, Evelyn was already fully dressed, had

her coat and purse, and was ready to go. This seemed very strange to Robbie because for weeks, her mother would get up about 8 or 8:30 a.m., and then would sit in her robe while they had coffee together. At the scene, Evelyn screamed hysterically at Glenda, saying Glenda did not belong there. Evelyn "barged" into the condo and then rushed out to say something to her husband as he was put in the ambulance.

After the shooting, Evelyn rejected the attempts of her children to comfort her and did not offer comfort to them or her grandchildren. As soon as Robbie came in the door from the police station, only hours after the shooting, her mother began screaming about who had her father's legal papers. Detective Loeffler testified that unlike other persons who suffered the loss of an estranged spouse, Evelyn Davis did not even question how or why someone would shoot her husband or whether the police would catch the assailant. Robbie testified that she thought it was strange that George would not look at her when they were both at the police station.

The children must establish every element of their claim by a preponderance of the evidence, meaning more likely true than not true. Keeping this standard in mind, the Court finds that the evidence connects Cramer with the killing, and Cramer to Evelyn Davis, and shows that Evelyn Davis knew what was going to happen to her husband. In fact, after some effort, Mrs. Davis found out where the victim was living. This Court finds that Evelyn Davis both took action and gave encouragement that aided and assisted the killing. Furthermore, it may be inferred that Mrs. Davis intended that the victim be killed, or knew that the killing was intended when she provided aid and encouragement. The Court finds the testimony of the widow Davis totally unbelievable.

Appendix B

The claimant children have established by a preponderance of the evidence, that their mother, Evelyn Davis, aided and abetted the intentional and felonious killing of the insured, Thomas G. Davis. Therefore, the policy is payable, to the secondary beneficiaries, as though Evelyn Davis had predeceased her husband.

Judgment may be entered accordingly.

s/ George La Plata
George LaPlata
U. S. District Judge

January 10, 1991
Ann Arbor, MI

[stamped]
A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY s/ illegible
DEPUTY CLERK

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JANUARY 10, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

C.A. No. 88-CV-60112-AA

HON. GEORGE La PLATA

EVELYN C. DAVIS,

Plaintiff,

vs.

CONNECTICUT GENERAL LIFE INSURANCE, et al.,

Defendants.

JUDGMENT

For the reasons set forth in this Court's Opinion of January 10, 1991, it is HEREBY ORDERED that Judgment be ENTERED against the Claimant Mrs. Evelyn Davis and in favor of the Claimant Children Robbie Townsend, Sandra Patterson, Ila Tuttle, Thomas Davis, Jr., James Davis and Jody Davis.

s/ George La Plata
George La Plata
U.S. District Judge

January 10, 1991
Ann Arbor, MI

APPENDIX D — RELEVANT PLEADINGS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

88 CV 60112 AA

Hon. G. LA PLATA

EVELYN C. DAVIS,

Plaintiff,

v

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendant,.

JAMES K. HACKER P.C. (P23771)
DONALD E. MATHER, P.C. (P17199)
Attorneys for Claimant
Evelyn C. Davis
76 S. Gratiot Mt. Clemens, Michigan 48043
(313) 467-8000

CARL E. BELTZ, JR. (P10667)
EUGENE F. WILLIAMS (P22344)
Attorney for Claimants' Sandra
D. Patterson, Robbie S.
Townsend, Ila C. Tuttle,
Thomas G. Davis, Jr., James L. Davis
and Jodie B. Davis
78 Macomb place
Mount Clemens, Michigan 48043
(313) 469-2444

Appendix D

MOTION FOR ENTRY OF ORDER OF JUDGMENT

NOW COMES; Sandra D. Patterson, Robbie S. Townsend, Ila C. Tuttle, Thomas G. Davis, Jr., James L. Davis and Jodie B. Davis; Claimants' in the above action by their attorneys and moves this Court for entry of an ORDER OF JUDGMENT in accordance with the opinion rendered, pursuant to Fed. Rules Civ. P. 58 and 67.

1. This Court rendered it's opinion on January 10, 1991 that the secondary beneficiaries are entitled to the proceeds of the subject matter insurance policy.

2. That there is on deposit with the Treasurer of the United States of America pursuant to Fed. Rule Civ P. 67 a sum of money which represents the face policy amount together with interest thereon from the date of death which was paid to the clerk of the Court pursuant to a complaint of interpleader by Connecticut General Life Insurance Company.

3. That pursuant to the Courts opinion the above claimants, Sandra D. Patterson Robbie S. Townsend, Ila C. Tuttle, Thomas G. Davis, Jr., James L. Davis and Jodie B. Davis; are entitled to the proceeds of the policy as if and as though Evelyn C. Davis had predeceased her husband.

4. That attached to this motion is a copy of the order determining heirs issued by James Nowicki, Judge of Probate of the County on Macomb setting forth the identity of the claimants.

WHEREFORE claimants ask this Court to sign an order in accordance with its opinion rendered on January 10, 1991 directing the Department of the Treasury of the United States of America to pay to the Claimants the full amount deposited with It together with

such interest as may have been earned there on in accordance with the provisions of Fed. Rules Civ. P. 67.

January 16, 1991

Respectfully Submitted

s/ Carl E. Beltz, Jr.
Carl E. Beltz, Jr.
Co-Counsel for Claimants
Children of the deceased

Appendix D

James M. Hacker, P.C.
Attorneys and Counselor at Law

76 South Gratiot Avenue
Suite 106
Mount Clemens, Michigan 48043

Telephone; (313) 463-8000
Telecopier; (313) 463-7428

January 23, 1991

Mr. Carl E. Beltz, Jr.
78 Macomb Place
Mt.Clemens, MI 48043

RE: Davis v Connecticut General Life
Case No: 88 CV 60112 AA

Dear Mr. Beltz:

I have your Motion for Entry of Order of Judgment.

If you will send me a copy of your proposed Judgment so that I might review it for form, I can tell you whether or not I object to the language and we can submit competing Judgments to the court for entry, if necessary.

The Motion for Entry of Judgment does not assist me in ascertaining whether or not your Judgment is correct. If you are inclined to do that, I think we can shortcut the matter.

Please let me have your soonest advise.

Appendix D

Very Truly Yours,

s/ James M. Hacker
James M. Hacker

JMH:nb

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

88 CV 60112 AA

Hon. G. LA PLATA

EVELYN C. DAVIS,

Plaintiff, and Claimant

v

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a foreign corporation,

Defendant,.

ORDER OF WITHDRAWAL OF FUNDS

Pursuant to this Courts opinion of January 10, 1991, Claimants' Sandra D. Patterson, Robbie S. Townsend, Ila C. Tuttle, Thomas G. Davis, Jr., James L. Davis and Jodie B. Davis, filed a Motion for Entry of Judgment to which no objections were filed by Evelyn C. Davis in accordance with Local Rule 17 (f) (g) and (i).

IT IS THEREFORE ORDERED that the funds now on deposit in an interest bearing account be released and paid over to the following persons in the principal amounts set forth together with such earned interest in the prorated amounts, in compliance with Local Rule 19 of the Eastern District of Michigan.

The principal amount deposited with the Court on July 26, 1991 was $157,635. The clerk shall withhold an amount equal to the

first forty-five days of earned interest as the Court Ordered Registration fee set forth in It's Order of July 24 1990 directing the Clerk to deduct any fees authorized by the Judicial Conference of the United States.

The Balance of the Principal and earned interest shall be divided equally amongst the following six claimants.

Sandra D. Patterson
20781 Audrey
Warren, Michigan 4091
SS# 376-56-9342

Robbie S. Townsend,
3001 SW 23rd Lane
Hallandale, Florida 33009
SS# 379 54 0514

Ila C. Tuttle,
9099 Fairfield Road
Algonac, Michigan 48001
383-60-0462

Thomas G. Davis, Jr.,
Huntington on The Hill
Apartments
Westland, Michigan
380-64-1305

James L. Davis
20409 Webster Rd.
Mt. Clemens, Michigan 48043
376-74-6535

Jodie B. Davis
20409 Webster Rd.
Mount Clemens, Michigan 48043
363-776-9396

s/ illegible
U.S. DISTRICT COURT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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FILED
SEPT 13 9 1 9 15 AM

C.A. No. 88-CV-60112-AA

HON. GEORGE La PLATA

EVELYN C. DAVIS,

Plaintiff,

vs.

CONNECTICUT GENERAL LIFE INSURANCE, et. al.,

Defendants.

ORDER DENYING EVELYN DAVIS'
MOTION FOR RELIEF FROM JUDGMENT

This action involves competing claims to proceeds of a group life insurance policy insuring the life of Thomas G. Davis, by his wife Evelyn Davis and their six children. On January 10, 1991, following a bench trial and for the reasons stated in the Court's Opinion of the same date, Judgment was entered against the Claimant Evelyn Davis and in favor of the Claimant children, Robbie Townsend, Sandra Patterson, Ila Tuttle, Thomas Davis, Jr., James Davis and Jodi Davis. On March 20, 1991, Evelyn Davis

filed a motion for relief from the Judgment pursuant to Fed. R. Civ. P. 60(b). Mrs. Davis asks that the Court vacate and reenter the Judgment so tht she can file a timely notice of appeal. The Claimant Children have opposed the requested relief.[1]

The notice of appeal from the judgment in this case should have been filed with the district court within 30 days after the Judgement was entered. Fed. R. App. P. 4(a)(1). Upon a motion filed *not later than 30 days* after expiration of the time prescribed by Rule 4(a) and upon a showing of excusable neglect or good cause, the district court could have extended the time for filing a notice of appeal. Fed. R. App. P. 4(a)(5). Although the record indicates proof of service of the Judgment by mail to James Hacker, counsel for Mrs. Davis, he states that he did not know that the Judgment had been entered until March 15, 1991, more than 60 days after entry of the Judgment on January 10, 1991. The Sixth Circuit has held that the district court is without authority to grant an extension of time to file a notice of appeal requested after the period for making such a request has expired. *Beard* v. *Carrollton RR*, 893 F.2d 117, 120 (6th Cir. 1989). *Pryor* v. *Marshall*, 711 F.2d 63 (6th Cir. 1983). Mrs. Davis filed her untimely notice of appeal, along with the pending motion, on March 20, 1991.

Apparently aware of the jurisdictional nature of the time limits of Fed. R. App. P. 4(a), plaintiff seeks relief from the Judgment under Rule 60(b)(1) and (6). While a number of courts have entertained a Rule 60(b) motion for the purpose of renewing the time to appeal, neither the parties nor the Court has found Sixth Circuit authority directly addressing the issue.

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1 As indicated by the Order for Submission and Determination without Oral Hearing, the Court has determined that oral hearing on this motion is not necessary.

Appendix D

Whether relief is sought under Rule 60(b)(1), for mistake or neglect, or under Rule 60(b)(6), for any other reason justifying relief, courts have consistently barred relief when the only reason for the failure to appeal timely is the lack of notice of entry of the judgment. *Tucker* v. *Commonwealth Land Title Ins. Co.*, 800 F.2d 1054 (11th Cir. 1986) (60(b)(6)), *Stevens* v. *ITT Systems, Inc.*, 868 F.2d 1040 (9th Cir. 1989) (60(b)(1)). Where relief is allowed under Rule 60(b), courts have required that in addition to a lack of notice, there be a showing of due diligence in ascertaining whether judgment had been entered. *Id.*

The Court in *Tucker* notes that a few courts have applied Rule 60(b)(6) so liberally as to not require a showing of due diligence. However, the Sixth Circuit is not likely to follow such a view since it has held generally that Rule 60(b)(6) should be used only in exceptional or extraordinary circumstances. *In re Salem Mortgage Co.*, 791 F.2d 456, 459 (6th Cir. 1986). In addition, allowing a party to resurrect his right to appeal without requiring more than a failure to receive notice, would violate the clear meaning of Fed. R. Civ. P. Rule 77(d).

Keeping in mind the circumstances of the cases cited herein and by the parties, the Court turns to the facts of this case to determine whether counsel exercised due diligence in ascertaining whether judgment has been entered in this case.

Mr. Hacker states by affidavit that he never received the Judgment entered on January 10, 1991, although he did receive the Court's Opinion filed on the same date. The Opinion states in closing that "Judgment may be entered accordingly." Mr. Hacker received a motion dated January 16, 1991 on behalf of the Claimant Children entitled Motion for Entry of Order of Judgment. By a letter dated January 23, 1991, Mr. Hacker requested a copy of the

Appendix D

Proposed Judgment from opposing counsel, Carl Beltz, Jr., which suggests Mr. Hacker's belief that a Judgment had not been entered.

However, Mr. Beltz responded in a letter dated January 25, 1991, and in a telephone call on January 26th, that under Fed. R. Civ. P. 58, the Court prepares and enters its own orders. Further, the motion of the Claimant Children sought disbursement of the funds which had been deposited with the Court which was granted by the Order of Withdrawal of funds filed on February 22, 1991. In fact, Mr. Beltz states that he met with Mr. Hacker and his co-counsel Mr. Donald Mather on February 27, 1991, and personally informed Mr. Mather that the funds had been disbursed pursuant to the Judgment.

However, it was not until March 13, 1991, that inquiry was made on behalf of Mr. Hacker to ascertain when and whether a Judgment had been entered. Paula Turner was told that the file would be reviewed and she was asked to call back the next day. She returned the call and left a message on March 14th. On March 15th, she was advised by the Court that Judgment had been entered on January 10, 1991, and that a proof of service showing notice to Mr. Hacker of the Judgment had also been entered.

Mr. Hacker knew from the Court's Opinion that a judgment would be entered against him. The Motion for Entry of Order of Judgment apparently led Mr. Hacker to believe that the Children were submitting the Judgment. However, when Mr. Hacker was advised otherwise in late January, no inquiry was made to the Court to ascertain whether Judgment had been or would be entered, and no response was filed to the motion. Further, even when informed in late February that the funds on deposit with the Court had been disbursed, inquiry was not made for two more weeks. This is not a case where counsel was misinformed or misled by the Court to believe that a judgment had not yet been entered, or where repeated inquiries to the Court were met with promises that prompt notice would be sent. In fact, the first inquiry was not made until after even the time for requesting an extension of the time to file a notice of

appeal had expired. Finally, review of the docket at any time after January 10, 1991, would have revealed a separate entry for the Judgment.

For the reasons stated above, the Court DENIES Claimant Evelyn Davis' motion for relief from the Judgment under Rule 60(b).

s/ George La Plata
George La Plata
U.S. District Judge

September 12, 1991
Ann Arbor, MI

APPENDIX E — RELEVANT RULES

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal As Of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

* * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order

denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the

time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 77. District Courts and Clerks

* * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

* * *

Rule 60. Relief From Judgment Or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record

and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgement is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and

(3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

* * *